FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

73-2036

No. A-1125

COMMERCE UNION BANK,
Plaintiff-Respondent,

vs.

INQUIPCO, INC., d/b/a INDUSTRIAL EQUIPMENT COMPANY et al.,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. A-1125

COMMERCE UNION BANK,
Plaintiff-Respondent,

vs.

INQUIPCO, INC., d/b/a INDUSTRIAL EQUIPMENT COMPANY et al.,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

Inquipco, Inc., your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Tennessee in which that court denied a writ of certiorari to the Tennessee Court of Appeals.

OPINIONS BELOW

The following opinions and decrees of the Tennessee Courts, none of which have been reported, are set forth in full in the Appendix:

A decree of Chancery Court. Part II for Davidson County, Tennessee, giving judgment for the respondent entered on October 14, 1971;

a decree of this same Court dismissing petitioner's petition for a Writ of Error *Coram Nobis* entered November 10, 1972;

the opinion filed July 27, 1973, of the Court of Appeals of Tennessee, Middle Section, affirming the Chancery Court;

the opinion of the Court of Appeals of Tennessee, Middle Section, denying petitioner's petition to rehear filed October 26, 1973; and

the denial on February 19, 1974 by the Supreme Court of Tennessee of petitioner's petition for a writ of certiorari to the Court of Appeals of Tennessee.

On May 21, 1974, Mr. Justice Stewart granted petitioner's application for an extension of time in which to file this petition through July 19, 1974.

JURISDICTION

The Supreme Court of Tennessee denied a petition for writ of certiorari in this cause on February 19, 1974. Mr. Justice Stewart granted on May 21, 1974, petitioner's application for an extension of time in which to file this petition through July 19, 1974. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether a state procedure which deprives a party of a hearing, even after that party has made an actual appearance, violates the guarantees of due process and equal protection of the laws?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 17 of the Constitution of the State of Tennessee provides in pertinent part as follows:

> "That all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."

At the time this action was brought, Tennessee Code Annotated §21-501 provided in pertinent part as follows:

> "The bill or cross bill, or equivalent, may be taken for confessed in the following cases:
>
> (1) When, being duly served with process . . . the defendant fails to plead, answer, or demur by the time fixed by law."

At the time this action was brought, Tennessee Code Annotated §21-502 provided in pertinent part as follows:

> "Whenever an order pro confesso is lawfully had, the allegations in the bill or cross bill, or equivalent, are to be taken as admitted, except [as provided, none of which exceptions apply]."

STATEMENT OF THE CASE

The Plaintiff, Commerce Union Bank, filed suit against the Defendant, your petitioner, Inquipco, Inc. in the Chancery Court for Davidson County, Tennessee. The Plaintiff alleged that the Defendant was indebted to Plaintiff as a result of a recourse provision contained in an assignment of a retail installment contract. The Defendant was served with a summons which commanded it ". . . to appear . . . on . . . the 13th day of July, 1970, then and there to answer the original Bill of Complaint . . . ."

On July 13, 1970, the Defendant, through its President, James H. Williams, did appear, without an attorney, to make a defense. Mr. Williams was told by someone working in the Chancery Clerk and Master's Office that the trial was not set for that day, and he accordingly left. The Plaintiff without notice to the Defendant subsequently filed for and obtained a pro confesso against the Defendant. On October 12, 1971, Plaintiff was granted a judgment against Defendant for $12,226.81 plus interest and costs. The Defendant received no notice of these hearings and orders. The only notice it ever received at this stage was the original summons which it sought to answer at the proper time.

On January 10, 1972, Defendant, having engaged counsel, filed a motion for relief from judgment and the following week a petition for a Writ of Error *Coram Nobis*. This Writ was granted, but later upon a trial concerning only the issuance of the Writ, the Writ was dismissed.

Defendant perfected an appeal to the Tennessee Court of Appeals, which affirmed the Chancery Court. A Petition to Rehear by the Court of Appeals and a Petition for Certiorari to the Tennessee Supreme Court were denied.

Defendant's bank account was garnished shortly after the trial court's judgment, and the full amount of the judgment including attorney's fees was paid over to Plaintiff at that time. Thus, the Plaintiff has been only minimally inconvenienced by the appellate proceedings.

THE RAISING OF THE CONSTITUTIONAL QUESTION

The lack of notice to the Defendant after the initial summons was raised in Defendant's petition for a Writ of Error *Coram Nobis* filed with the trial court on January 18, 1972.

The Constitutional implications of this lack of notice were discussed by Defendant's counsel at the hearing on the issuance of the Writ of Error *Coram Nobis* held October 27, 1972. BILL OF EXCEPTIONS at 35-36 (on file with the Clerk of the Court of Appeals, Tennessee Supreme Court Building).

REASONS FOR GRANTING THE WRIT

After a lengthy search counsel for the petitioner are of the opinion that the precise question presented in this case has never been decided by the federal judiciary. It is, however, important, because if the present state court holdings are allowed to stand the guarantees of due process and equal protection will have been denied to petitioner. Petitioner, Defendant below, was properly served with a summons when this action was commenced. The summons ordered petitioner to appear and answer on a certain date. Petitioner did precisely what he was ordered to do by the literal language of the summons. This language was

not ambiguous; it was erroneous and misleading. Some legal documents because of the complex matters in which they are involved must appear ambiguous to the layman. However a summons at the commencement of a lawsuit should be clear rather than ambiguous, and in no event should be erroneous. To permit a pro confesso to be taken against petitioner with no further notice of any proceedings makes a travesty of due process guarantees.

Although the notice question involved in this case has not been explicitly decided heretofore, the present state decisions in this case conflict with principles enunciated in two prior decisions of this court. In *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950) the court stated that procedural due process requires that a party receive notice such that will inform him "of the pendency of the action and afford them an opportunity to present their objections. [citation omitted] The notice must be of such nature as reasonable to convey the required information . . . ." *Id.* at 314.

In the present case the petitioner received notice of the commencement of the action but was certainly denied an opportunity to defend. Moreover, the only notice which petitioner did receive obviously did not convey the required information and in fact conveyed erroneous information.

Although the petitioner followed the instructions of the summons he was denied a right to be heard by the absence of further notice. Without further notice the petitioner could only have remained informed by maintaining a "constant vigil" at the courthouse which should not be required. *Hagins* v. *Redevelopment Commission of Greensboro*, 275 N.C. 90, 165 S.E.2d 490 (1969). This Court has recently discussed the implications of this denial of a hearing in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions, ... its purpose . . . is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivation of property . . . ." *Id.* at 80-81.

In the present case petitioner had several meritorious defenses which it was prepared to raise in the trial court. The lack of notice of the proceedings against it denied it the hearing in which it was to raise these defenses. Thus petitioner asserts it was deprived of its property unfairly and mistakenly. Under the authority of the above quotation from *Fuentes* such a deprival of property should be in violation of the procedural due process guarantees of the Fourteenth Amendment.

It should further be noted that petitioner was denied equal protection of the laws under the procedure followed in determining whether petitioner was entitled to further notice. Petitioner through its President did make an actual appearance in the office of the Clerk. However, it did not make a technical appearance which required an entry in the docket book of the Court. There can be no rational basis for failing to give further notice, at least by mail to petitioner's known address. Petitioner has continued in business in well marked facilities in the Nashville area throughout the pendency of this action and was listed in the telephone directory. Plaintiff would have needed to expend virtually no effort to provide the petitioner with further notice. Had petitioner, seeking to represent itself, made a technical appearance, Plaintiff would have been no better and no less informed of petitioner's whereabouts. The distinction between an actual and a technical appearance is not sensible as an explanation for a failure

to require further notice of the proceedings. Because the distinction has no rational basis it deprives petitioner of equal protection of the laws in contravention of the Fourteenth Amendment.

CONCLUSION

To protect the integrity of the Court's *Central Hanover Trust Company* and *Fuentes* decisions it is essential that a party receive meaningful and correct notice of the proceedings in an action against it. The present state court decisions in this case are in conflict with this principle. Therefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOEL H. MOSELEY
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2313 Hillsboro Road
Nashville, Tennessee 37212
Attorney for Petitioner

July, 1974

APPENDIX

DECREE ENTERED OCT. 14, 1971—M.B. 84, PAGE 113

IN THE CHANCERY COURT OF METROPOLITAN NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

No. 93468

COMMERCE UNION BANK

VS.

InQuipCo, INC., D/B/A INDUSTRIAL EQUIPMENT COMPANY AND ALTON R. DAVIS, d/b/a DAVIS CEMENT COMPANY

JUDGMENT DECREE

This cause came on to be heard this 5th day of October, 1971, before the Honorable Frank F. Drowota III, Chancellor holding Part II of the Chancery Court for Nashville and Davidson County, Tennessee, on the original bill, the answer of defendant, Alton R. Davis, the pro confesso taken against the defendant, InQuipCo, Inc., and the entire record in this cause. The complainant requested the Court to be permitted to non-suit as to defendant, Alton R. Davis, which was allowed by the Court.

The complainant requested to amend the amount asked for in the bill of complaint to show the balance due of Eight thousand six hundred ten and 43/100 ($8,610.43) dollars and the Court permitted said amendment.

At the conclusion of all the proof and upon the entire record, the Court finds that the complainant is entitled to a judgment against the defendant for Eight thousand six hundred ten and 43/100 ($8,610.43) dollars plus interest amounting to Five hundred fifty-nine and 68/100 ($559.68) dollars and attorney's fees of Three thousand fifty-six and 70/100 ($3,056.70) dollars to Wilson West, attorney of record for complainant.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the complainant, Commerce Union Bank, shall have and recover of the defendant, Nine thousand one hundred seventy and 11/100 ($9,170.11) dollars plus the sum of Three thousand fifty-six and 70/100 ($3,056.70) dollars attorney's fees to Wilson West, Attorney together with the costs of this cause for which execution may issue, if necessary.

/s/ Frank F. Drowota III
Chancellor

Approved for Entry:

/s/ Wilson West
Attorney for Complainant

A3

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE, PART II

CIVIL ACTION NO. 93468

INQUIPCO, INC., d/b/a Industrial Equipment Company and LPM Parts and Service

VS.

COMMERCE UNION BANK

DECREE

This cause came on to be heard on this the 27th day of October, 1972, before the Honorable Frank Drowota, Chancellor, holding Part II of the Chancery Court for Metropolitan Nashville and Davidson County, Tennessee, upon a petition for a writ of error coram nobis, the answer and cross-claim of the defendant, Commerce Union Bank, and the answer to the cross-claim, the testimony of the petitioner's witness, other proof in the cause and the entire record, and argument of counsel, from all of which it appears to the Court that the original decree in the case of Commerce Union Bank vs. Inquipco, Inc., Rule No. 93468, was obtained in a lawful and legal manner, and that the complainant in that case complied with all the rules of law and of this Court in obtaining said judgment, and that the petitioner has failed to establish any legal reason to set aside the decree heretofore entered, and petition for a writ of error coram nobis should therefore be dismissed.

The Court further finds that the cross-claim of Commerce Union Bank is not entitled to interest and is therefore denied.

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court:

1. That the petition for a writ of error coram nobis is denied.

2. That the claim for interest by the cross-claimant is denied.

3. The costs of this cause will be paid by the petitioner.

4. To the foregoing action of the Court, the petitioner prays an appeal to the next term of the Court of Appeals, State of Tennessee, sitting at Nashville, and said appeal is by the Court granted upon the petitioner's executing an appeal bond within thirty (30) days of the date of this Decree and filing the Bill of Exceptions within sixty (60) days.

_____

Chancellor

Approved for Entry:

_____

Solicitor for complainant

_____

Solicitor for defendant

A5

DAVIDSON EQUITY

COMMERCE UNION BANK,
Complainant-Appellee,

VS.

INQUIPCO, INC., D/B/A INDUSTRIAL EQUIPMENT COMPANY and ALTON R. DAVIS, D/B/A DAVIS CEMENT COMPANY,
Defendant-Appellant

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM PART II, CHANCERY COURT,
DAVIDSON COUNTY, TENNESSEE

HONORABLE FRANK F. DROWOTA, III, CHANCELLOR

FILED: JULY 27, 1973

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LARRY L. ROBERTS
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ROBERT P. THOMAS
BOULT, CUMMINGS, CONNERS & BERRY, American Trust Building, Nashville, Tennessee

SOLICITORS FOR DEFENDANT-APPELLANT

Thos. A. Shriver
Presiding Judge

AFFIRMED

DAVIDSON EQUITY

COMMERCE UNION BANK,
Complainant-Appellee,

VS.

INQUIPCO, INC., D/B/A INDUSTRIAL EQUIPMENT COMPANY and ALTON R. DAVIS, D/B/A DAVIS CEMENT COMPANY,
Defendant-Appellant.

OPINION

This is an appeal from a decree of the Chancery Court, Part II, at Nashville, wherein the Petition of Inquipco, Inc. for a Writ of Error Coram Nobis was dismissed.

The cause originated when Commerce Union Bank filed its original bill of complaint on June 12, 1970 against Inquipco, Inc., d/b/a Industrial Equipment Company and Alton R. Davis, d/b/a Davis Cement Company, seeking a decree for a balance of $8,455.30, plus interest and attorney's fee, on a contract of Davis Cement Company with Inquipco, Inc. for the purchase of industrial equipment, which contract was assigned to the complainant, Commerce Union Bank.

Subpoena to answer was issued as to the defendants on June 12, 1970 and was duly served on Davis, who filed an answer thereto, and on Jim Williams, President of Inquipco, Inc. on June 17, 1970, citing defendants to appear in Chancery Court on July 13, 1970, at which time Mr. Williams, who is not an attorney, appeared at the Clerk's Office of the Chancery Court and inquired of someone behind the counter at the Clerk's Office concerning the case and upon learning that it was not to be heard that day, he departed and took no further steps concerning

same until an execution by garnishment was served on his Bank, impounding funds therein for the satisfaction of the judgment which had been obtained.

Alton R. Davis, d/b/a etc., filed an answer to the bill of Commerce Union Bank admitting the execution of the contract in question made for the purchase of a trailer and certain construction equipment and asserting that certain payments had been made on said contract and denying liability thereunder.

Subsequently, the suit was dismissed as to Davis, and on November 6th, 1970 the Commerce Union Bank moved for a pro confesso against defendant, Inquipco, Inc., which motion was granted and pro confesso duly entered.

Thereafter, on October 14th, 1971, the following decree was entered:

"JUDGMENT DECREE"

This cause came on to be heard this 5th day of October, 1971, before the Honorable Frank F. Drowota, III, Chancellor, holding Part II of the Chancery Court for Nashville and Davidson County, Tennessee, on the original bill, the answer of defendant, Alton R. Davis, the pro confesso taken against the defendant, Inquipco, Inc., and the entire record in this cause. The complainant requested the Court to be permitted to non-suit as to defendant, Alton R. Davis, which was allowed by the Court.

The complainant requested to amend the amount asked for in the bill of complaint to show the balance due of Eight thousand six hundred ten and 43/100 ($8,610.43) dollars and the Court permitted said amendment.

At the conclusion of all the proof and upon the entire record, the Court finds that the complainant is entitled to a judgment against the defendant for Eight thousand six hundred ten and 43/100 ($8,610.43) dollars, plus interest, amounting to Five hundred fifty-nine and 68/100 ($559.68) dollars, and attorney's fees of Three thousand fifty-six and 70/100 ($3,056.70) dollars to Wilson West, attorney of record for complainant.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the complainant, Commerce Union Bank, shall have and recover of the defendant, Nine thousand one hundred seventy and 11/100 ($9,170.11) dollars, plus the sum of Three thousand fifty-six and 70/100 ($3,056.70) dollars attorney's fee to Wilson West, Attorney, together with the costs of this cause, for which execution may issue, if necessary.

/s/ Frank F. Drowota, III
Chancellor

Approved for Entry:
/s/ Wilson West
Attorney for Complainant"

On January 10, 1972 motion was filed, signed by Joel H. Moseley, solicitor for Inquipco, Inc., to relieve defendant of the final judgment theretofore entered in the cause on the ground:

1. That at the time of the original service of process the defendant was not represented by counsel but entered an appearance in person before the Chancery Court, Part II, of Davidson County on July 13th, 1970 and was told that it was not necessary for him to be there on that date; and,

3. That the only notice of the filing of this suit received by the defendant was the original bill coupled with a subpoena, and that he received no subsequent notice of the proceedings in the case, not being represented by counsel he received no notice of the pro confesso.

On January 18th, 1972 defendant filed his Petition for a Writ of Error Coram Nobis, in which petition it is averred that a judgment for $9,170.00, plus $3,057.70 attorney's fees was entered against Inquipco, Inc., based upon a bill and pro confesso, and stating:

> "Petitioner denies that it is fully liable thereon, and further denies that the defendant herein had a right to bring suit thereon at the time the original bill was filed."

It is further averred that petitioner would have made defense but for the fact that he did not receive notice of the actual hearing of the cause and that petitioner was not represented by counsel, and that, therefore, he received no copy of a motion for pro confesso, and he avers:

> "Petitioner was prevented from making its defense because of the failure of the complainant in the original cause to notify the petitioner herein of the time and place for the hearing of said cause."

The prayers of the petition are: (1) For notice of the petition and that the Chancellor's Fiat stand and operate as a Writ of Error Coram Nobis; (2) For a writ of supersedeas to stay all further proceedings; and (3) That at the hearing said decree be recalled, reversed and annulled.

The answer and cross-claim of defendant, Commerce Union Bank, admits the entry of the decree in question,

denies any irregularity in obtaining judgment against petitioner; denies that the judgment would have been any different had the petitioner, original defendant, appeared in Court and, by way of cross-claim, asserts that its attorney is holding the funds in question subject to the orders of the Court, and prays for the legal rate of interest on said funds during the pendency of the cause on Petition for Writ of Error Coram Nobis.

The answer to the cross-petition joins issue.

The cause came on to be heard before Chancellor Drowota on the Petition for Writ of Error Coram Nobis, testimony of the parties and evidence introduced in Court, at the conclusion of which the Chancellor ruled on the case and, as is shown by the bill of exceptions, among other things, stated that Mr. Williams, President of Inquinco, Inc., after being served with process on June 17, 1970 calling for a response on July 13th, 1970, went to the Clerk's Office of the Chancery Court and inquired about the case and was informed that it would not be heard that day, whereupon, he, a layman, (the oral statement proceeds):

> ". . . went back to his office and waited from the period of July 13th, 1970 until November 6th, 1970, a period of time in which, under our old rules, a motion for pro confesso could have been placed on the Clerk and Master's docket. This was not done until the 6th of November, and the pro confesso was granted on November the 9th. It was after a pro confesso had been taken as to both defendants, on November the 9th, that he indicated, on November the 17th, he had a 'phone call from an attorney. . . . Under our pro confesso, it takes as confessed all of the items in the original bill of complaint. In this matter, the pro confesso was set aside as to Davis,

and Davis went on and answered at a later date. I think the record indicates that the answer was filed in December—December 7th of '71—by the attorney representing Davis. But, even after that period of time, some sixteen months passed from the date of service which was the one notice in this case, up until the time the case was actually set in March for an October 5th date. The point I'm trying to make is that there were records available in the Court to be shown to anyone, be it Mr. Williams or his attorney. Number one, the pro confesso was taken against them back in November of '70 and, anytime after March the 19th, he could have found out that this case was set on October the 5th. Now, the decree and judgment didn't go down until October the 14th of '71, many days after the case was actually heard, and that judgment did not become final for some thirty days. We are here today on the writ of error coram nobis. Even looking at it, like I say, from a layman's standpoint of what he should and should not know, I feel like there has certainly been negligence on the part of the defendant, and I can't see that the proceedings to judgment were in any way irregular or illegal.....

I do not see that, under our old rules, the proceedings were irregular, and I don't think there was sufficient basis here today for this Court to grant the writ."

The foregoing oral findings were implemented by the entrance of the following decree on November 10, 1970:

"DECREE

"This cause came on to be heard on this the 27th day of October, 1972 before the Honorable Frank F.

Drowota, III, Chancellor, holding Part II of the Chancery Court for Metropolitan Nashville and Davidson County, Tennessee, upon a Petition for a Writ of Error Coram Nobis, the answer and cross-claim of the defendant, Commerce Union Bank, and the answer to the cross-claim, the testimony of the petitioner's witness, other proof in the cause and the entire record, and argument of counsel, from all of which it appears to the Court that the original decree in the case of Commerce Union Bank vs. Inquipco, Inc., Rule No. 93468, was obtained in a lawful and legal manner, and that the complainant in that case complied with all the rules of law and of this Court in obtaining said judgment, and that the petitioner has failed to establish any legal reason to set aside the decree heretofore entered, and the Petition for a Writ of Error Coram Nobis should, therefore, be dismissed.

The Court further finds that the cross-claim of Commerce Union Bank is not entitled to interest and is, therefore, denied.

It is, therefore, ORDERED, ADJUDGED AND DECREED by this Court.

1. That the Petition for Writ of Error Coram Nobis is denied.

2. That the claim for interest by the cross-claimant is denied.

3. The costs of this cause will be paid by the petitioner.

4. To the foregoing action of the Court, the petitioner prays an appeal to the next term of the Court of Appeals, State of Tennessee, sitting at Nashville,

and said appeal is by the Court granted upon the petitioner's executing an appeal bond within thirty (30) days from the date of this Decree and filing the Bill of Exceptions within sixty (60) days.

/s/ Frank F. Drowota, III
Chancellor

Approved for Entry:

Solicitor for Complainant

/s/ Wilson West
Solicitor for Defendant"

ASSIGNMENT OF ERROR

The single assignment of error is:

"The Court erred as a matter of law by holding that the original decree was obtained in a lawful and legal manner."

The thrust of the petitioner's argument is that the obtaining of the pro confesso and the following judgment on the bill of complaint and pro confesso are void as having been obtained without due process of law; that any system of judicial rules which prevents defendant from having his day in Court violates due process.

Section 21-501, T.C.A. provides that a bill, or cross-bill, or equivalent, may be taken for confessed in the following cases:

"(1) When, being duly served with process, as provided in Chapter 2 of this title, the defendant fails to plead, answer, or demur by the time fixed by law."

Section 21-503, T.C.A. provides that, whenever an order pro confesso is lawfully had, the allegations in the bill, or cross-bill, or equivalent, are taken as admitted, except in certain cases not pertinent to the present inquiry.

It is to be noted that the foregoing statutes were in effect at the time the pro confesso was entered in the instant case.

In *Martin* v. *Wood*, 212 Tenn. 389, 370 S.W. 2d 478, it was held:

> "Upon being personally served with summons, and properly brought before Court, the defendant was given actual notice of suit and was charged with notice of all subsequent steps to be taken in the case down to and including final judgment, although he did not, in fact, appear and had no actual notice of such steps."

We are convinced that the Chancellor was not in error in dismissing the Petition for Writ of Error Coram Nobis in this cause, and that the petitioner was not denied due process in the rendering of the judgment in question. It results that the assignment of error is overruled and the judgment of the Chancellor is affirmed.

AFFIRMED.

/s/ Thos. A. Shriver
Presiding Judge

Puryear, J., Concurs
Todd, J., Concurs

DAVIDSON EQUITY

COMMERCE UNION BANK,
Complainant-Appellee,

VS.

INQUIPCO, INC., D/B/A INDUSTRIAL EQUIPMENT COMPANY and ALTON R. DAVIS, D/B/A DAVIS CEMENT COMPANY,
Defendant-Appellant

ON PETITION TO REHEAR

The defendant-appellant, Inquipco, Inc., has filed a Petition to Rehear, asserting that it is much aggrieved by the opinion of this Court in this cause, which Opinion was filed July 27, 1973, and asking a rehearing to the end that said Opinion and the decree of this Court be set aside as being erroneous.

The Petition and the brief in support of same present a reargument of the issues which were fully considered by the Court and disposed of in the Opinion and decree complained of. Therefore, the Petition is respectfully denied.

/s/ Thos. A. Shriver
Presiding Judge

Puryear, J., Concurs
Todd, J., Concurs

SUPREME COURT, NASHVILLE

Davidson Equity

COMMERCE UNION BANK

vs.

INQUIPCO, INC., PETITIONER

Writ Denied.

Upon consideration of the petition for a writ of certiorari herein to the Court of Appeals, Middle Section at Nashville, the said petition is hereby denied, at the cost of petitioner. 2/19/74.

OFFICE OF CLERK OF THE COURT OF APPEALS

For the Middle Division of the State of Tennessee

I, RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the ORDER DENYING CERTIORARI of said Court, pronounced at its September term, 1973, in case of COMMERCE UNION BANK vs. INQUIPCO, INC., Petitioner as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 9th day of July, 1974.

/s/ Ramsey Leathers, Clerk

(Seal)

By .....,
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. A-1125

INQUIPCO, INC., DBA INDUSTRIAL EQUIPMENT COMPANY, et al.,
Petitioners

v.

COMMERCE UNION BANK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 19, 1974.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 21st day of May, 1974.

LIBRARY
SUPREME COURT, U. S.

SEP 14 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

73-2036
No. A-1125

COMMERCE UNION BANK,
Plaintiff-Respondent,

vs.

INQUIPCO, INC., d/b/a INDUSTRIAL EQUIPMENT COMPANY et al.,
Defendant-Petitioner.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. A-1125

COMMERCE UNION BANK,
Plaintiff-Respondent,

vs.

INQUIPCO, INC., d/b/a INDUSTRIAL EQUIPMENT COMPANY et al.,
Defendant-Petitioner.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

Commerce Union Bank, your Plaintiff-Respondent herein, files this, its reply to the Petition for Writ of Certiorari.

OPINIONS

The various Opinions and Decrees of the Tennessee Courts are properly set forth in the Appendix.

QUESTION PRESENTED

Whether a Defendant making a personal appearance failed to have its name entered on the Court records as representing itself, did not retain counsel, and nothing appeared of record to notify counsel for Plaintiff-Respondent, could the Plaintiff-Respondent then proceed under *Tennessee Code Annotated,* Section 21-501 to legal judgment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution granting due process and the equal protection of the laws certainly pertained to the Defendant-Petitioner herein under the following Tennessee State Statute:

Tennessee Code Annotated, Section 21-501.

"The bill or cross bill, or equivalent, may be taken for confessed in the following cases:

(1) When, being duly served with process, as provided in chapter 2 of this title, the defendant fails to plead, answer, or demur by the time fixed by law."

STATEMENT OF THE CASE

The statement of the case in the Petition is substantially correct. The Plaintiff-Respondent specifically calls attention to the fact that the Defendant-Petitioner is a Corporation and that the President of the Defendant-Petitioner company is not an Attorney and admittedly appeared without an Attorney to make a defense for a Corporation.

CONSTITUTIONAL QUESTION

Defendant-Petitioner did nothing after its President made an alleged appearance at the Clerk and Master's office on July 13, 1970 until judgment was taken on October 5, 1971, some fifteen (15) months later.

The Defendant-Petitioner, having failed to answer, plead or demur as required by the Statute 21-501 herein set out, gave right to Plaintiff-Respondent to proceed to pro confesso, then judgment, then a right to an execution on the judgment.

The Defendant-Petitioner was required under the Statute to answer, plead or demur none of which were ever filed. The Defendant-Petitioner did not avail itself of the right to plead, answer or demur and had it done so as required by the law of Tennessee, this matter would not now be on Petition for Certiorari in this Honorable Court.

REASONS FOR NOT GRANTING THE WRIT

The Defendant-Petitioner failed to avail itself of protection laws provided by the State of Tennessee. The State law ordered Defendant-Petitioner to answer under *Tennessee Code Annotated,* Section 21-201;

Tennessee Code Annotated, Section 21-201.

"Upon the bill being filed and the required security given, the clerk, after indorsing upon the bill the date of the filing and entering the cause in his rule docket, shall forthwith issue subpoena to answer, and copy of the bill for the defendant, and all other process ordered."

and pro confesso was granted under Section 21-501 as provided by the Tennessee Statute.

The Defendant-Petitioner's President was the single witness to testify that he appeared at the Clerk's office and though he appeared without Attorney, the Corporation failed to answer as provided by the Tennessee State Statutes. The Defendant-Petitioner Corporation, failing to answer, plead or demur, gave the right by law to Plaintiff-Respondent to proceed under the State Statutes and all the Courts in Tennessee, including the Tennessee Supreme Court, held that the Plaintiff-Respondent proceeded in a legal manner in all actions it took under the law.

The Plaintiff-Respondent assumes that the reason no Federal cases were reported on this subject is because the Defendant-Petitioner failed to avail itself of State laws provided to give it its day in Court and therein, it failed to exhaust its remedy at the State level.

CONCLUSION

The cases cited by the Defendant-Petitioner have no relation to the case at bar. The Fuentes decision having to do with repossession of property by an officer of the law, held that a hearing must be given the Defendant before a proper Tribunal before the possession of property could be had and certainly has no relationship to the case at bar.

The applicable State laws under which the judgment was obtained against the Defendant-Petitioner provided for the Defendant-Petitioner to have its day in Court and it failed to avail itself of those laws.

Respectfully submitted,

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September, 1974